

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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|--|---|---------------------------------------|
| Ray A. Perry, | : | |
| Plaintiff-Appellant, | : | |
| v. | : | No. 11AP-571 (C.C. No. 2010-09752) |
| Ohio Department of Rehabilitation and Correction, | : | (REGULAR CALENDAR) |
| Defendant-Appellee. | : | |

D E C I S I O N

Rendered on February 7, 2012

Ray A. Perry, pro se.

Michael DeWine, Attorney General, and *Emily M. Simmons*,
for appellee.

APPEAL from the Court of Claims of Ohio.

BROWN, P.J.

{¶1} Ray A. Perry, plaintiff-appellant, appeals from a judgment of the Court of Claims of Ohio, in which the court granted the motion for summary judgment filed by the Ohio Department of Rehabilitation and Correction ("ODRC").

{¶2} In March 1993, appellant was convicted of felonious assault, aggravated burglary, and carrying a concealed weapon, in case No. CR-291732, and was sentenced to an aggregate indefinite sentence of eight to 25 years. Appellant was paroled in August

2001 but was ordered to complete the sentence under the supervision of the Adult Parole Authority ("APA").

{¶3} In September 2002, in case No. CR-420801, appellant was convicted of felony escape for violating his parole. He was sentenced to two years in jail plus three years of post-release control. Appellant was subsequently released.

{¶4} In September 2005, in case No. CR-464744A, appellant was convicted of escape after failing to report, and he was sentenced to one year of community control sanctions under the supervision of the APA. The trial court further ordered appellant to serve 55 days in county jail, but having met the conditions of 55 days in county jail, community control was terminated and appellant was released. Appellant remained on parole in case No. CR-291732.

{¶5} In August 2007, appellant was found guilty of escape in case No. CR-474846, related to his parole requirements in case No. CR-291732. Appellant was sentenced to two years in jail, plus two years of post-release control.

{¶6} In August 2010, appellant was released on parole in case No. CR-291732.

{¶7} On August 6, 2010, appellant filed a complaint in the Court of Claims alleging false imprisonment. On March 21, 2011, ODRC filed a motion for summary judgment. The trial court granted ODRC's motion for summary judgment on May 27, 2011. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

[I.] A period of post[-]release control supervision pursuant to R.C. 2967.28, does not run concurrently or consecutively to parole supervision pursuant to R.C. 2967.15, because the parole is satisfied (fulfilled) during the post[-]release control period pursuant to R.C. 2967.28(F)(4)(b).

[II.] Defendants must be notified of the imposition of post[-] release control at the time of sentencing pursuant to R.C. 2929.14(F), R.C. 2967.28 and Hernandez vs. Kelly, 108 Ohio St.[3d] 395, 2006-Ohio-126.

[III.] An escape conviction is unlawful pursuant to R.C. 2921.34(B)(2), when the detaining authority knew or should have known there was no legal basis for the detention.

[IV.] Escape pursuant to R.C. 2921.34, is a third-degree felony, when the most serious offense for which the person was under detention is a felony of the 5th degree pursuant to R.C. 2921.34.

[V.] My original conviction that brought me into [t]he criminal justice system is unconstitutional and is a violation of Crim[.]R. 16(i) and (ii).

[VI.] During my appeal, I was denied the right of appeal, the right of appellate counsel and the right of effective assistance of appellate counsel pursuant to Ohio Rules of Criminal Procedure R. 44.

{¶8} All of appellant's assignments of error allege that the trial court erred when it granted summary judgment on his false-imprisonment claim. When reviewing a motion for summary judgment, courts must proceed cautiously and award summary judgment only when appropriate. *Franks v. The Lima News*, 109 Ohio App.3d 408 (3d Dist.1996). Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the nonmoving party. *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589 (1994). When reviewing the judgment of the trial court, an appellate court reviews the case *de novo*. *Franks*.

{¶9} Pursuant to R.C. 2743.02(A)(1), the state may be held liable for the false imprisonment of its prisoners. *Bennett v. Ohio Dept. of Rehab. & Corr.*, 60 Ohio St.3d 107 (1991), paragraph two of the syllabus. False imprisonment occurs when a person confines another intentionally without lawful privilege and against his consent within a limited area for any appreciable time. *Id.* at 109, citing *Feliciano v. Kreiger*, 50 Ohio St.2d 69, 71 (1977). The elements for wrongful imprisonment of an inmate beyond a lawful term of incarceration would be: (1) expiration of the lawful term of confinement, (2) intentional confinement after the expiration, and (3) knowledge that the privilege initially justifying the confinement no longer exists. *Corder v. Ohio Dept. of Rehab. & Corr.*, 94 Ohio App.3d 315, 318 (10th Dist.1994). However, an action for false imprisonment cannot be maintained when the imprisonment is in accordance with the judgment or order of a court, unless it appears such judgment or order is void on its face. *Bradley v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 07AP-506, 2007-Ohio-7150, ¶ 10, citing *Bennett*.

{¶10} Before addressing appellant's assignments of error, it is necessary to review appellant's false-imprisonment claim as alleged in his complaint. Appellant alleges in his complaint that he was arrested on January 22, 2007 for felony escape, and in September 2007, he was sentenced to two years of imprisonment, plus three years of post-release control in case No. CR-474846. He claims he was entitled to jail-time credit starting January 22, 2007; thus, he was entitled to release from prison on the two-year sentence on January 22, 2009. He also claims he earned 12 days of good-time credit while incarcerated and was entitled to one day off his two-year sentence because 2008 was a leap year, thereby moving his release date back to January 9, 2009. Therefore,

appellant claims in his complaint he was falsely imprisoned from January 9, 2009, until his eventual release in August 2010.

{¶11} Attached to ODRC's motion for summary judgment was the affidavit of Melissa Adams, the chief of the bureau of sentence computation. In the affidavit, Adams averred that: (1) In March 1993, in case No. CR-291732, appellant was convicted of felonious assault, aggravated burglary, and carrying a concealed weapon; (2) appellant was incarcerated on April 6, 1993, serving a three-year term for a gun specification consecutive with eight to 25 years for the felonious assault and aggravated burglary charges, with 99 days of jail-time credit, resulting in December 21, 2020 being the maximum expiration date of his sentence; (3) appellant was paroled on August 22, 2001; (4) appellant was declared at large on January 15, 2002 and was restored to parole on April 7, 2002, resulting in March 13, 2021 being the maximum expiration date of his sentence after the 82 days of lost time were added; (5) appellant was convicted of escape again in case No. CR-420801, and was incarcerated on September 30, 2003, serving a two-year term plus three years of post-release control, while his parole was revoked on the previous charges and his sentences were aggregated; (6) appellant was paroled on November 2, 2004, but was still required to fulfill his obligations until the end of his sentences in case No. CR-291732; (7) appellant was declared at large on November 15, 2004, and was restored to parole on July 30, 2005, thereby adding 257 days for lost time; (8) In 2005, appellant was convicted of escape in case No. CR-464744A, and he was sentenced to one year of community control and ordered to contemporaneously serve 55 days in county jail, after which his community control in case No. CR-464744A was terminated and he was released; (9) appellant's duty to report as a result of his conviction

in case No. CR-291732 continued; (10) appellant was again declared at large on September 29, 2005, and was restored to parole on February 15, 2007, thereby adding 504 days for lost time; (11) as a result of the lost-time amounts, appellant's maximum expiration of his sentence changed to April 13, 2023; (12) appellant failed to meet his reporting obligations and was convicted of escape in case No. CR-474846, and he was incarcerated on September 27, 2007, to serve a two-year term, plus two years of post-release control; (13) on March 16, 2009, appellant was awarded 132 days of jail-time credit; (14) the expiration of appellant's two-year term in case No. CR-474846 was May 6, 2009; and (15) appellant's parole in case No. CR-291732 was revoked, and the maximum expiration of his sentence became April 13, 2023.

{¶12} In its decision, the trial court relied upon Adams's affidavit to find that, inasmuch as appellant's lawful term of imprisonment does not expire until April 13, 2023, ODRC was authorized to imprison or supervise appellant at all times relevant. Furthermore, with regard to appellant's claim that ODRC improperly revoked his parole following his conviction for escape in 2007, ODRC's decision to revoke parole was an exercise of an executive function involving a high degree of official judgment or discretion pursuant to legislative authority and, thus, is not actionable under the discretionary immunity doctrine. The trial court also concluded that, to the extent appellant is challenging the sentences imposed upon him by the common pleas court, appellant may not substitute an action in the Court of Claims for a right of appeal in a different court.

{¶13} Our analysis begins with our conclusion that the trial court did not err when it relied upon Adams's affidavit to find appellant's lawful term of imprisonment does not expire until April 13, 2023; thus, ODRC was authorized to imprison or supervise appellant

at all times relevant. We have no reason to question the logic or truthfulness of Adams's affidavit. It is with this conclusion as a foundation that we address appellant's assignments of error to see if appellant raises any valid arguments to refute this conclusion.

{¶14} We will address appellant's first, second, third, and fourth assignments of error together, as they all suffer from the same deficiency. Summaries of the arguments are as follows. Appellant argues under his first assignment of error that a period of post-release control supervision pursuant to R.C. 2967.28 does not run concurrently or consecutively to parole supervision, pursuant to R.C. 2967.15, because the parole is satisfied during the post-release control period pursuant to R.C. 2967.28(F)(4)(b). More specifically, appellant argues: (1) he was released on parole in August 2001 pursuant to R.C. 2967.15 in case No. CR-291732, to serve a one-year period of parole; (2) while on the one-year period of parole, he was convicted of escape in case No. CR-420801 pursuant to R.C. 2921.34, which is a second-degree felony; (3) he received a two-year prison term, plus three years of post-release control; (4) the three years of post-release control in case No. CR-420801, which began on November 14, 2004, satisfied the former parole, pursuant to R.C. 2967.15, because the requirements of parole are satisfied by the post-release control period pursuant to R.C. 2967.28(F)(4)(b); and (5) even though his parole was satisfied under R.C. 2967.28(F)(4)(b), the ODRC is still using his old parole in case No. CR-291732 to keep him incarcerated.

{¶15} Appellant argues in his second assignment of error that ODRC must be notified of the imposition of post-release control at the time of sentencing pursuant to R.C. 2929.14(F), 2967.28, and *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844

N.E.2d 301. Specifically, appellant contends he pled guilty to escape on September 25, 2005, in case No. CR-464744A, served a 55-day prison sentence, and was released on probation, with the probation being terminated. Appellant claims he had no further parole or post-release control obligations because the judge did not order him placed on post-release control after the expiration of his sentence and probation; thus, his subsequent incarceration for escape in August 2007 in case No. CR-474846 was illegal because he was never properly placed on post-release control after the prior escape conviction.

{¶16} Appellant argues in his third assignment of error that an escape conviction is unlawful, pursuant to R.C. 2921.34(B)(2), when the detaining authority knew or should have known there was no legal basis for the detention. Specifically, appellant contends that, because the judge in the September 2005 escape case, case No. CR-464744A, never placed him on post-release control, his December 2005 indictment for escape, in case No. CR-474846, was improper, and ODRC knew or should have known that there was no legal basis for his post-release control, which made unlawful his escape conviction in case No. CR-474846.

{¶17} Appellant argues in his fourth assignment of error that escape, pursuant to R.C. 2921.34, is a third-degree felony, when the most serious offense for which the person was under detention is a felony of the fifth degree pursuant to R.C. 2921.34. Specifically, under this assignment of error, appellant contends that his second-degree felony conviction in case No. CR-474846 was unlawful because his conviction prior to that in case No. CR-464744A was a fifth-degree felony. Appellant maintains that, pursuant to R.C. 2921.34(C)(2)(b), if an offender is under detention for a fifth-degree felony, he can only be prosecuted for a third-degree felony escape under R.C.

2921.34(C)(2)(b) for breaking that detention, but he was prosecuted for a second-degree felony escape.

{¶18} In addressing these assignments of error, we first point out that none of appellant's arguments in his first, second, third, and fourth assignments of error were raised in his complaint. In his complaint, appellant alleged false imprisonment from the period of January 9, 2009 until his eventual release in August 2010, which related to his September 2007 escape conviction in case No. CR-474846. However, appellant's argument in his first assignment of error relates to his escape violation and conviction in March 2002. Furthermore, although his second, third, and fourth assignments of error argue the illegality of the imprisonment for his September 2007 escape conviction in case No. CR-474846, none of the contentions raised in these three assignments of error were included in the allegations in his complaint. Again, appellant's only assertion in his complaint was that he should have been released from prison for his escape conviction in case No. CR-474846 on January 9, 2009, based upon jail-time credit and a leap year, which none of his first four assignments of error address.

{¶19} Nevertheless, even if we were to address appellant's contentions, we would still find them meritless. Initially, we note that appellant's arguments are difficult to understand at times, hampering our review. Notwithstanding, with regard to appellant's first assignment of error, this appears to be the same argument raised by appellant in *State v. Perry*, 8th Dist. No. 90497, 2008-Ohio-5588, and rejected by that court. The issue-preclusion branch of the *res judicata* doctrine operates to collaterally estop a party from drawing into question in a second action a point or fact which was actually and directly in issue in a former action, and was there passed upon and determined by a court

of competent jurisdiction. See *Grava v. Parkman Twp.*, 73 Ohio St.3d 379 (1995); *Norwood v. McDonald*, 142 Ohio St. 299, 306 (1943). In the present case, appellant argues that the three years of post-release control in case No. CR-420801 satisfied the parole requirements in case No. CR-291732 pursuant to R.C. 2967.28(F)(4)(b). In *Perry*, appellant argued that any parole requirements from case No. CR-291732 terminated upon his subsequent conviction for escape in case No. CR-420801, the sentence which included a term of post-release control. Citing former R.C. 2967.28(F), the court held that it:

[C]annot accept the contention that a new conviction terminated the reporting requirements for the earlier conviction. The record indicates that defendant is [a] "hybrid" parolee, as he is subject to three years of post-release control (in connection with Case No. 420801) and sixteen years of parole (in connection with Case No. 291732). The shorter period of post-release control is to be followed by parole supervision. The earlier requirement of parole supervision was not extinguished by the subsequent imposition of post-release control.

Id. at ¶ 25.

{¶20} Furthermore, as Adams averred, when appellant was convicted of escape in case No. CR-420801 and incarcerated on September 30, 2003, his parole was revoked in case No. CR-291732. Although appellant was paroled on November 2, 2004, he was still required to fulfill his reporting obligations until the end of his sentence in case No. CR-291732, and appellant could have remained legally incarcerated until the end of his sentence in case No. CR-291732. For these reasons, even if we were to address appellant's first assignment of error, such would lack merit.

{¶21} Appellant's second, third, and fourth assignments of error were also discussed and addressed in *Perry*. Appellant seems to be arguing in his second

assignment of error that his incarceration for escape in August 2007, in case No. CR-474846, was illegal because he was never properly placed on post-release control after the prior escape conviction in case No. CR-464744A. However, the court in *Perry* indicated that appellant was found guilty of escape in August 2007 in case No. CR-474846 only for his breaking detention in case No. CR-291732. *Id.* at ¶ 17. Thus, we fail to see how his post-release control after the conviction in case No. CR-464744A is relevant to this finding. Furthermore, as the court in *Perry* noted, "we cannot interpret the trial court's September 26, 2005 journal entry issued in Case No. 464744A as terminating the jurisdiction of the Adult Parole Authority in other separate matters for which parole and post-release control were imposed." *Id.* at ¶ 25. Therefore, even if the trial court terminated the jurisdiction of the APA in case No. CR-464744A, appellant was still subject to the terms of his parole in case No. CR-291732. This rationale also applies to defeat appellant's arguments in his third and fourth assignments of error, both of which seem to be based on the misguided contention that his conviction for escape in case No. CR-474846 was based upon his detention in case No. CR-464744A. Thus, even if we could address them, we find appellant's second, third, and fourth assignments of error would lack merit. For all the foregoing reasons, appellant's first, second, third, and fourth assignments of error are overruled.

{¶22} We address appellant's fifth and sixth assignments of error together, as they must both be rejected based upon the same rationale. Appellant argues in his fifth assignment of error that his original conviction in case No. CR-291732 was unconstitutional and a violation of Crim.R. 16. Appellant argues in his sixth assignment of error that, during his appeal of case No. CR-291732, he was denied the right of appeal,

the right of appellate counsel, and the right of effective assistance of appellate counsel pursuant to Crim.R. 44. However, appellant already had the opportunity to appeal these matters in his appeal of his conviction in case No. CR-291732. A party who has had the opportunity to appeal a criminal conviction cannot substitute an action in the Court of Claims for an appeal to the proper appellate court. *Dunlap v. Ohio Pub. Defender's Office*, 10th Dist. No. 08AP-474, 2009-Ohio-363. Furthermore, the statute governing actions in the Court of Claims, R.C. 2743.02, was not intended to confer jurisdiction for the Court of Claims to review criminal proceedings occurring in the court of common pleas. *Id.*, citing *Donaldson v. Court of Claims of Ohio*, 10th Dist. No. 91AP-1218 (May 19, 1992); *Troutman v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 03AP-1240, 2005-Ohio-334. For these reasons, appellant's fifth and sixth assignments of error are overruled.

{¶23} Accordingly, appellant's six assignments of error are overruled, and the judgment of the Court of Claims of Ohio is affirmed.

Judgment affirmed.

TYACK and DORRIAN, JJ., concur.
